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No. 84-1529

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

AMERICAN HOSPITAL ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR AMICUS CURIAE AMERICAN ACADEMY OF PEDIATRICS IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR AMICUS CURIAE AMERICAN ACADEMY OF PEDIATRICS IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

The American Academy of Pediatrics (the "Academy") submits this brief *amicus curiae* in support of Respondents American Hospital Association, *et al.*, in opposition to the Petition for a Writ of Certiorari filed by Secretary Margaret M. Heckler ("the Secretary") of the Department of Health and Human Services ("HHS"). It is accompanied by the written consents of Petitioner and Respondents.

INTEREST OF AMICUS CURIAE

The Academy is a non-profit organization comprised of more than 28,000 board-certified pediatricians, the majority of whom practice medicine in hospitals which would

be affected by any decision of this Court concerning the application of Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, to medical treatment of seriously ill infants. Through professional policy papers and in educational programs of all kinds, the Academy serves as an advocate of children and their right to medical care. Through grants awarded by the Department of Education, Office of Special Education and Rehabilitative Services, the Academy has developed state by state education programs for pediatricians to work with school systems in furnishing education for handicapped children throughout the country. In addition, the Academy's Committee on Bioethics has coordinated educational programs concerning the bioethical dimensions of pediatric treatment decisions involving handicapped children, and has developed statements of bioethical principles for Academy adoption.

The Academy has also been actively involved in judicial and administrative proceedings considering the applicability of Section 504 to medical treatment decisions. First, the Academy was the lead plaintiff in *American Academy of Pediatrics v. Heckler*, 561 F. Supp. 395 (D.D.C. 1983), *appeal dismissed*, No. 83-1407 (D.C. Cir. Aug. 4, 1983), which invalidated an "interim final rule" (48 Fed. Reg. 9630 (March 7, 1983)) promulgated under Section 504 concerning discrimination against handicapped infants. Second, the Academy presented detailed comments to HHS in response to proposed rules (48 Fed. Reg. 30846 (July 5, 1983)) regarding discrimination on the basis of handicap in medical treatment of newborns. These rules, in revised form, are the regulations at issue in this case. 49 Fed. Reg. 1622 (Jan. 12, 1984).[1]

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[1] The Academy also played a central role in promoting a consensus among members of Congress and representatives of various medical, right-to-life and disability groups on the legislation which was ultimately enacted as the Child Abuse Amendments of 1984, Pub. L. 98-457, 98 Stat. 1749 *et seq.* Petitioner has recognized that support by medical associations, such as the Academy, was "essen-

Since the instant case deals squarely with the issue of whether Section 504 provides a basis for the federal government to investigate and intervene in individual medical treatment decisions concerning impaired newborns, the Academy believes it is important to reiterate its concerns on this issue for the benefit of this Court.

ARGUMENT

Review on writ of certiorari is not a matter of right and should only be granted when there are "special and important reasons therefor." Sup. Ct. R. 17.1. Because the United States Court of Appeals for the Second Circuit, after an exhaustive review of the statute and legislative history of Section 504 in *United States v. University Hospital, State University of New York at Stony Brook*, 729 F.2d 144 (2d Cir. 1984),[2] correctly held that Section 504 does not authorize federal intervention into medical treatment decisions in the manner contemplated by Petitioner's rules, there is no reason for this Court to consider this issue.

Moreover, partially in reaction to the decisions in *University Hospital* and *American Academy of Pediatrics*, Congress enacted the Child Abuse Amendments of 1984

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tial to accomplishing [this] legislative compromise. . . ." 50 Fed. Reg. 14879 (April 15, 1985). Subsequently, the Academy presented extensive comments to HHS in response to proposed rules implementing the amendments (49 Fed. Reg. 48160 (Dec. 10, 1984)). Comments of the American Academy of Pediatrics on Proposed Rule Regarding Child Abuse and Neglect Prevention and Treatment Program and Interim Model Guidelines for Infant Care Review Committees (49 Fed. Reg. 48160, 48170 (Dec. 10, 1984)) (Feb. 8, 1985). In part due to consideration of the Academy's comments, these rules were substantially revised when published in final form. 50 Fed. Reg. 14878 (April 15, 1985).

[2] In the decision below, American Hospital Association v. Heckler, Nos. 84-6211, 84-6213 (2d Cir. Dec. 27, 1984) (*per curiam*), *aff'g by unpublished order*, 585 F. Supp. 541 (S.D.N.Y. 1984), the Court of Appeals summarily affirmed the district court's judgment on the basis of *University Hospital*.

Pub. L. 98-457, 98 Stat. 1749 *et seq.*, thus resolving the issue of federal-state responsibility for investigating reports of inappropriate withholding of medical treatment and obviating the need for review of this case. Petitioner's suggestion (Petition for Writ of Certiorari ("Pet.") at 12) that, in the absence of review by this Court, medical treatment decisions concerning disabled infants will be "cloaked with blanket immunity" from scrutiny and will result in maltreatment of infants is thus totally unfounded and fundamentally misrepresents the state of the law as it applies to disabled infants. Accordingly, the Petition for a Writ of Certiorari should be denied.

I. THE COURT OF APPEALS CORRECTLY HELD THAT SECTION 504 OF THE REHABILITATION ACT DOES NOT AUTHORIZE FEDERAL INTERVENTION INTO MEDICAL TREATMENT DECISIONS REGARDING SERIOUSLY IMPAIRED NEWBORNS

The expansive reading of Section 504 urged by Petitioner is unsupported by the statute's legislative history and is contrary to established judicial precedent concerning the scope of the discrimination prohibition in Section 504. The statute simply does not authorize federal intervention in the critical care nursery in the manner contemplated by Petitioner's rules.

A. Congress Did Not Intend That Section 504 Serve As the Basis for Federal Intervention In Medical Decisionmaking

This Court has recognized that "language as broad as that of § 504 cannot be read in isolation from its history and purposes." *Consolidated Rail Corp. v. Darrone*, 104 S. Ct. 1248, 1254 n.13 (1984). To determine the scope of Section 504, it is necessary to examine congressional intent. Contrary to Petitioner's suggestion (Pet. at 18), the legislative history of Section 504 is not "sparse" as to Congress' intent. In fact, the legislative history clearly indicates that Congress was initially only concerned with

discrimination against handicapped individuals in terms of employment. *See, e.g.*, 119 Cong. Rec. 24,587 (1973) (remarks of Sen. Taft on S. 1875, 93d Cong., 1st Sess. (1973)).[3] Later, this goal was expanded to remove barriers to access in education, transportation, and social services.[4] Yet contrary to Petitioner's assertion (Pet. at 18), the expansion of the scope of the statute in no way indicates that Congress intended Section 504 to authorize federal regulation of medical treatment decisions. To the extent that Congress even contemplated "health services" as being subject to Section 504, it did so only in the sense of requiring providers to make such services equally available to all persons who are able to meet a particular program's requirements in spite of their handicap, a far different situation than the intrusion into individual medical care decisions contemplated by Petitioner's rule. *See* S. Rep. No. 1297, 93d Cong., 2d Sess. 38, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388-89. The only specific reference to medicine or health services in the legislative history is in the context of access to nursing home services:

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[3] Accordingly, Congress originally defined the phrase "handicapped individual" in terms of employment:

> The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services. . . .

Section 7(6), Pub. L. No. 93-112, 87 Stat. 355.

[4] As part of the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, § 111(a), 88 Stat. 1619), Congress expanded the definition to encompass "impairments to major life activities." Under the 1974 amendments, a "handicapped individual" is:

> any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

> Examples of handicapped individuals who may suffer discrimination in the receipt of Federally-assisted services but who may have been unintentionally excluded from the protection of Section 504 by the references to enhanced employability in section 7(6) are as follows:
>
> * * * *
>
> admission to Federally-assisted nursing homes on the basis of their handicap. . . .

Id.

Petitioner asserts that by patterning Section 504 after Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d *et seq.*, Congress intended that Section 504's prohibition against discrimination because of handicap be construed as broadly as the prohibition of racial discrimination in Title VI. Pet. at 19. Yet the very decisions of this Court cited by Petitioner demonstrate that Section 504 does not constitute the sweeping prohibition of discrimination on the basis of handicap that Title VI mandates for discrimination on the basis of race. In *Alexander v. Choate*, 105 S. Ct. 712, 717 (1985), this Court wrote that "there are reasons to pause before too quickly extending [case law interpreting Title VI] to § 504." Similarly, in *Consolidated Rail*, 104 S. Ct. at 1254 n.13, this Court noted that there are significant distinctions between the purposes and scope of Title VI and Section 504. Indeed, this Court's decisions have recognized that Section 504 does not mandate a total ban on distinctions in federally-funded programs between individuals on the basis of handicap. *See Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *cf. Community Television of Southern California v. Gottfried*, 459 U.S. 498 (1983) (holding that Section 504 does not require the Federal Communications Commission to alter its standard for reviewing public television license renewal applications to include consideration of the needs of the hearing-impaired).

Moreover, Petitioner proposes an overly simplistic analogy between Title VI and Section 504. Petitioner argues

(Pet. at 19) that just as a federally assisted hospital cannot, under Title VI, refuse to perform surgery to remove an intestinal obstruction in an infant solely because of his race, so too the hospital cannot, under Section 504, refuse to perform the surgery because of the infant's "handicap" (*e.g.*, Down's Syndrome). This argument ignores the fact that whereas race is never a proper consideration in a decision to provide medical services, the type of "handicap" to which Petitioner refers is integrally related to, and often an essential consideration in, a decision as to what type of medical treatment is appropriate. *See University Hospital*, 729 F.2d at 156. In fact, Petitioner concedes (Pet. at 20 n.17) that it "may be more difficult [to apply Section 504] in such circumstances because of the interrelatedness of the medical considerations." *See* 49 Fed. Reg. 1637 (1984).[5]

In sum, no part of the legislative history of the Rehabilitation Act of 1973 indicates a congressional concern with individual medical decisions, much less physician and parental decisions concerning complex medical treatment for critically ill newborns and infants. In addressing the scope of Section 504 in the context of disparate-impact discrimination, this Court expressly noted that had Congress intended the statute to reach all such claims, "we would expect some indication of that purpose in the statute or its legislative history. Yet there is nothing to suggest that such was Congress' purpose." *Alexander v. Choate*, 105 S. Ct. at 720. The same is true in this case. Had Congress intended Section 504

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[5] Petitioner nevertheless contends that the existence of difficult cases does not justify the wholesale exclusion of medical treatment decisions from Section 504. Pet. at 20 n.17. As will be shown in detail below, because the Child Abuse Amendments of 1984 and the regulations promulgated thereunder ensure that seriously ill infants will not be deprived of medically indicated treatment, the absence of Section 504 enforcement poses no danger to such infants. If anything, the presence of the intrusive federal measures for which Petitioner claims authority could endanger the health of these infants. *See infra* pp. 13-20.

to reach medical treatment decisions, some indication of this intent would be evident in the legislative history. As noted by the United States Court of Appeals for the Second Circuit, "the failure of congress [sic] to focus on treatment decisions involving defective newborn infants strikes a telling blow to the government's position." *University Hospital*, 729 F.2d at 160.[6]

B. Petitioner's Section 504 Analysis Violates Judicial Decisions Concerning the Scope of the Application of Section 504

Case law interpreting Section 504 uniformly establishes that the statute has a limited scope. First, the statute only prohibits discrimination against "otherwise qualified" handicapped individuals. Second, Section 504 cannot be interpreted to impose unwarranted affirmative action burdens on providers. Petitioner's expansive reading of Section 504 ignores both of these limitations.

1. *A Seriously Impaired Newborn Infant Is Not An "Otherwise Qualified" Handicapped Individual*

This Court in *Southeastern Community College v. Davis* held that an otherwise qualified individual is "one who is able to meet all of a program's requirements in spite of his handicap." 442 U.S. at 406. *See also Doe v. New York University*, 666 F.2d 761, 775 (2d Cir. 1981). The legislative and earlier regulatory history of Section 504 make clear that a health care provider may not discriminate against a handicapped individual when the individual's handicap is unrelated to the provision of medical services. In the same way that a hospital is prohibited from refusing to treat individuals because of their

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[6] In American Academy of Pediatrics v. Heckler, 561 F. Supp. 395 (D.D.C. 1983), *appeal dismissed*, No. 83-1407 (D.C. Cir. Aug. 4, 1983), Judge Gesell also noted that while Section 504 was open to broad interpretation, "no congressional committee or member of the House or Senate *ever even suggested* that section 504 would be used to monitor medical treatment of defective newborn infants or establish standards for preserving a particular quality of life." *Id.* at 401 (emphasis added).

race under Title VI of the Civil Rights Act of 1964 (Pet. 17 n.13), a hospital is prohibited by Section 504 as a general policy from refusing to treat handicapped individuals solely because of their handicap, because that does not involve an individual treatment decision and because the handicap typically is entirely unrelated to the medical treatment at issue.

The Secretary, however, improperly argues that when a "handicap" is related to the infant's need for treatment, a hospital is prohibited by Section 504 from basing a treatment decision in a particular case in any part on the "handicap." Pet. at 15 and n.11. The analogy to Title VI breaks down when applied to medical decisionmaking because the medical handicap is typically inextricably intertwined with the treatment decision itself. *See University Hospital*, 729 F.2d at 156.[7]

For example, in *University Hospital*, the child involved, "Baby Jane Doe," suffered from multiple birth defects, including: myelomeningocele (commonly known as spina bifida); microcephaly, an abnormally small head; hydrocephalus, accumulated fluid in the cranial vault; a "weak face," which prevented her from closing her eyes or making a full suck with her tongue; a malformed brain stem; upper extremity spasticity; and a thumb implanted in her fist. 729 F.2d at 146.[8] Obviously, treatment of any

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[7] As discussed at p. 6, this Court has cautioned against being too quick to draw analogies between Title VI and Section 504. Alexander v. Choate, 105 S. Ct. at 717; *Consolidated Rail*, 104 S. Ct. at 1254 n.13.

[8] The diversity and complexity of Baby Jane Doe's medical impairments is not unique; most infants with medical problems suffer from varied and complex medical impairments. Infants suffering from prematurity and immaturity, particularly with extreme hypoxic stress at birth, and complications of intensive care, such as chronic lung disease and compromised intestinal function, constitute a large population, conservatively estimated at 30,000 live births annually. *See* Comments of the American Academy of Pediatrics on Proposed Rule Regarding Child Abuse and Neglect Prevention and Treatment Program and Interim Model Guidelines for

of these impairments would have to be based on the infant's entire medical profile. Petitioner concedes as much by admitting that the application of Section 504 is somewhat tortured in the context of medical treatment decisions "because of the interrelatedness of the medical considerations." (Pet. at 20 n.17.) Since medical treatment necessarily depends on the specific illness or injuries present, *any* decision by a hospital not to treat one particular condition could be said to have been made "solely on the basis of the infant's handicap," and thus, in the view of Petitioner, in violation of Section 504. Congress cannot be assumed to have intended such an absurd result. Moreover, Petitioner's analysis has no support in the language, legislative history or case law interpreting Section 504, and this reasoning was specifically rejected by the Second Circuit. *University Hospital*, 729 F.2d at 156-57.

A further bar to applying Section 504 to medical treatment decisions concerning disabled infants is that an infant's medical condition is constantly changing—what the *University Hospital* court termed the "fluid context of medical treatment decisions." 729 F.2d at 156. In programs or activities that are fixed or "static" in nature, such as education, employment and transportation, certain standards on handicapped availability or access to a particular program can be established, as can appropriate modifications to accommodate the handicapped. Medical treatment decisions, on the other hand, depend on the changing conditions of the patient. As Judge Gesell emphasized in *American Academy of Pediatrics v. Heckler*, "*there is no customary standard of care* for the treatment of severely defective infants." 561 F. Supp. at 400 (emphasis in original). Thus, an inquiry into "discrimination" in this context is meaningless when different treatment decisions are appropriate depending on the

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Infant Care Review Committees (49 Fed. Reg. 48160, 48170 (Dec. 10, 1984)) (Feb. 8, 1985).

particular infant and his or her changing medical conditions.

2. *Petitioner's Final Rule Would Improperly Require Affirmative Action by Hospitals*

This Court also recognized in *Southeastern Community College v. Davis* that "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." 442 U.S. at 411. In *Davis*, a licensed practical nurse contended that her denial of admission to a college nursing program on the basis of her hearing disability violated Section 504. As part of her argument, she asserted that regulations implementing Section 504 required that the nursing program be modified to accommodate her, to which this Court replied:

> If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute.

Id. at 410. This Court thus distinguished the provision of equal opportunity from affirmative action, stating that "[t]he language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the *distinction between the evenhanded treatment* of qualified handicapped persons *and affirmative efforts to overcome the disabilities* caused by handicaps." *Id.* (emphasis added). This Court found that Section 504 does not impose any requirements upon institutions to take substantive steps outside their ordinary programs to eliminate or overcome handicaps. *Id.* at 413.

Similarly, in *Doe v. New York University*, 666 F.2d 761, the Second Circuit rejected the claim of a mentally handicapped student who sought readmission to medical school. The court found that the school was "not obligated by the Act to alter, dilute or bend [its admission standards] to admit the handicapped applicant." 666

F.2d at 775. Petitioner's rules—potentially requiring hospitals to undertake surgery notwithstanding parental consent, or resort to state courts to override parental consent—clearly require hospitals to undertake extensive affirmative action. The rules would not only obligate the provider to "alter" or "bend" its procedures for making medical treatment decisions, but require the provider to undertake legal actions outside of its internal decision-making structure. Such a total transformation of the provider's process of rendering health care clearly exceeds the type of modifications that are permissible under Section 504.

This Court has also recognized that interpretation of Section 504 must keep the statute "within manageable bounds." *Alexander v. Choate*, 105 S. Ct. at 720-21 n.20. Section 504 cannot serve as a basis for a "burdensome . . . mandate" on federally assisted activities or programs. *American Public Transit Association v. Lewis*, 655 F.2d 1272, 1278 (D.C. Cir. 1981). Petitioner's rules constitute exactly the kind of burdensome and disruptive measures that are beyond the requirements authorized by these judicial decisions. Under Petitioner's rules, nonmedical teams of HHS employees, designated by HHS as "Baby Doe Squads," would be granted expedited access to investigate any report of suspected discriminatory treatment of impaired infants. 45 C.F.R. § 84.55(e). As noted by Judge Gesell, the intrusion of these "Baby Doe Squads" into hospitals would impose unwarranted burdens on hospitals, and would endanger the health of the infant:

> [A]ny anonymous tipster, for whatever personal motive, can trigger an investigation involving immediate inspection of hospital records and facilities and interviewing of involved families and medical personnel. In a desperate situation where medical decisions must be made on short notice by physicians, hospital personnel and often distraught parents, the sudden descent of "Baby Doe" squads on the scene, monopolizing physician and nurse time and making

> hospital charts and records unavailable during treatment, can hardly be presumed to produce higher quality care for the infant.

American Academy of Pediatrics v. Heckler, 561 F. Supp. at 399 (footnote omitted). Certainly, Congress did not intend Section 504 to authorize intervention which would harm the very individuals it is purporting to protect from discrimination.

II. THE CHILD ABUSE AMENDMENTS OF 1984 AND THE REGULATIONS PROMULGATED THEREUNDER OBVIATE THE NEED FOR REVIEW

On October 9, 1984, Congress adopted amendments to the Child Abuse and Treatment Act (42 U.S.C. §§ 5101 *et seq.*), Pub. L. 98-457, 98 Stat. 1749 *et seq.* [hereinafter the "Amendments"]. In contrast to Section 504, the Amendments employ a grant program to build on existing state mechanisms for dealing with child abuse and neglect, including instances of withholding of medically indicated treatment from disabled infants with life-threatening conditions.

To receive grants for its child protective services ("CPS") system, a state must establish procedures for: (1) consultation with designated individuals in hospitals; (2) notification of cases of suspected medical neglect (including instances of withholding of medically indicated treatment from disabled infants with life-threatening conditions); and (3) legal remedies, under state law, for the CPS agency to prevent the withholding of medically indicated treatment from disabled infants with life-threatening conditions. Section 122, 98 Stat. 1752-53 (amending 42 U.S.C. § 5103(b)(2)(K)). The federal role is limited to establishing a clearinghouse for information regarding developments in treatment and support services for disabled infants, and to promulgating regulations to ensure that states fulfill their obligations under the statute.[9] As noted by Senator Hatch, a principal sponsor of the

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[9] Sections 123(a), 124(a), 98 Stat. 1753-54.

1984 Amendments, the "legislation does not itself authorize direct federal involvement in individual cases." 130 Cong. Rec. S12392 (daily ed. Sept. 28, 1984) (letter from Sen. Hatch to Sen. Weicker).

On December 10, 1984, the Secretary published a Notice of Proposed Rulemaking (49 Fed. Reg. 48160) and, following a comment period, on April 15, 1985, issued final regulations (50 Fed. Reg. 14878) implementing the 1984 Amendments. Consistent with the Amendments and their legislative history, these regulations rely on state implementation and enforcement procedures to deal with reports of suspected or known medical neglect: "We believe it is the clear intent of Congress that States utilize their existing child protective services system to carry out this new responsibility [under the Amendments]." 50 Fed. Reg. 14883; *see id.* at 14882-84, 14887-88.[10] Petitioner admits that the procedures established by the Child Abuse Amendments are similar to those which it earlier required under Section 504, the authority for which is at issue here. Pet. at 26-27 n.22.

A. The Child Abuse Amendments Represent Congress' Belief that Medical Treatment Decisions Regarding Seriously Impaired Newborns Are Best Dealt With Under Existing State Mechanisms

Passage of the Child Abuse Amendments must be viewed in the context of the developments preceding what Petitioner has conceded was an "extraordinary effort" to

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[10] Pursuant to section 124(b) of the Amendments, 98 Stat. 1754, the Secretary also issued Model Guidelines for Health Care Providers to Establish Infant Care Review Committees to encourage the creation of infant care review committees (ICRCs) in hospitals. 50 Fed. Reg. 14893 (April 15, 1985). The Academy strongly supports the establishment of ICRCs to provide consultation and to ensure that sensitive treatment decisions are made in a reasoned, informed, and caring manner. Such committees, in conjunction with the procedures established through the state child protective services system, ensure that when treatment is medically indicated, the infant will receive appropriate care.

enact legislation in this most sensitive area. 50 Fed. Reg. at 14879. Following the highly-publicized "Baby Doe" case in Bloomington, Indiana, in the spring of 1983, HHS promulgated an "interim final rule," without prior notice or opportunity for public comment, requiring hospitals receiving federal financial assistance to post notices stating: "Discriminatory failure to feed and care for handicapped infants in this facility is prohibited by federal law." The rule also provided that anyone having knowledge that a handicapped infant was being discriminatorily denied food or customary medical care should contact a 24-hour-a-day "Handicapped Infant Hotline." Through the hotline *anyone*—a passerby, a disgruntled employee—could report what they considered to be suspicious hospital behavior. *See* 48 Fed. Reg. 9630 (Mar. 7, 1983).

Soon after the interim rule was proposed, the Academy and two other plaintiffs filed suit challenging the rule. In *American Academy of Pediatrics v. Heckler*, Judge Gesell struck down the rule, finding that HHS lacked a rational factual basis for the rule and that the agency had failed to follow required notice and comment procedures. 561 F. Supp. at 403. Judge Gesell cited numerous shortcomings in the rule, including the disruptive effect of HHS' enforcement procedures in caring for disabled newborns. *Id.* at 399. He also suggested that this issue "be clarified by further congressional action." *Id.* at 402.

HHS then issued a new proposed rule and solicited public comment. 48 Fed. Reg. 30846 (July 5, 1983) (proposed rule modifying 45 C.F.R. § 84.61). While HHS was in the process of preparing its final rule, the case of the infant "Baby Jane Doe" again raised the question of HHS' authority under Section 504 to intervene in medical treatment decisions, which led, after extensive proceedings, to the *University Hospital* decision.

Thus, in the fall of 1984 when Congress adopted the Child Abuse Amendments, it was well aware of the seri-

ous questions raised by these cases regarding the legal authority—let alone the wisdom—of federal intervention in medical treatment decisions. *See, e.g.*, S. Rep. No. 246, 98th Cong., 2d Sess. 6-8 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2918, 2922-25; 130 Cong. Rec. S8952 (daily ed. June 29, 1984) (remarks of Sen. Nickles). The Senate Report noted that "[t]he highly publicized recent cases have catapulted the issue of withholding treatment from seriously ill infants into the public arena . . . ." S. Rep. No. 246, 98th Cong., 2d Sess. 6 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2923.[11] Since the same subcommittees in the Senate Labor and Human Resources Committee and the House Education and Labor Committee have jurisdiction over both Section 504 and the child abuse and neglect grant program, Congress could easily have overruled *University Hospital* by expressly including coverage of medical treatment decisions of disabled infants in Section 504. Instead, Congress chose to assist the states in carrying out their traditional role in the area of child abuse and neglect.[12]

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[11] Congressional recognition of judicial interpretation of Section 504 is supported by the fundamental principle of statutory construction that:

> Congress does not legislate in a vacuum; Congressional legislation must be viewed in light of earlier legislation enacted in connection with the same subject matter and court decisions which have definitely determined the meaning and scope of that earlier legislation.

Application of United States, 407 F.Supp. 398, 405 (W.D. Mo. 1976).

[12] In the 1984 legislative session, Congress did consider amending Section 504, primarily to overrule this Court's decision in Grove City College v. Bell, 104 S. Ct. 1211 (1984). *See* H.R. 5490, 98th Cong., 2d Sess. (1984); S. 2568, 98th Cong., 2d Sess. (1984). Yet nothing in the proposed amendments indicates that Congress believed Section 504 applies, or should apply, to medical treatment decisions regarding disabled infants. None of the sponsors of the legislation, in presenting it to the full Senate, even mentioned disabled infants. For example, Senator Cranston, a co-sponsor of the amendments and principal author of Section 504, stressed that

As recognized by this Court, the "failure of Congress to alter [a statute] after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction be the correct one." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940); *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 732-33 (1975); *Lewis v. United States*, 663 F.2d 889, 891 (9th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982). Moreover, the subsequent interpretation of the federal role in medical treatment decisions concerning disabled infants by the same congressional committees that originally enacted Section 504 is "virtually conclusive" as to Congress' prior intended meaning. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 329 (1942); *see also Socony Mobil Oil Co. v. United States*, 287 F.2d 910, 914 (Ct. Cl. 1961); *accord Abell v. United States*, 518 F.2d 1369 (Ct. Cl. 1975), *cert. denied*, 429 U.S. 817 (1976). Given Congress' clear decision to let the *University Hospital* decision stand and adopt state-based enforcement procedures instead, there is no reason for this Court to review the decision below.[13]

B. The Child Abuse Amendments Maintain A Careful Balance Between Protecting the Rights of Disabled Infants and the Need to Avoid Unreasonable Governmental Intervention, Thus Rendering Review by This Court Unnecessary

Unlike Section 504, in which there was no discussion of medical treatment decisions, the Child Abuse Amend-

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the statute was intended to prevent discrimination in employment and education. 130 Cong. Rec. S4595 (daily ed. April 12, 1984) (remarks of Sen. Cranston).

[13] While it is true that the Child Abuse Amendments provide that nothing in the statute "is intended to affect any right or protection under Section 504 of the Rehabilitation Act of 1973," Section 127(a), 98 Stat. 1754, it is also true that in addressing the issue of medical care of disabled infants, Congress chose to use the state CPS system rather than authorizing federal intervention under Section 504.

ments were the product of extensive congressional negotiations which ultimately resulted in a legislative compromise. The Secretary has repeatedly recognized (50 Fed. Reg. 14881) that "the essence of this compromise" was based on the "careful balance" between the need to protect the rights of disabled infants and the need to avoid intrusive and inflammatory governmental intervention in medical decisionmaking:

> It is clear that the legislation represent[s] a careful balance between the need to establish effective protection of the rights of disabled infants and the need to avoid unreasonable governmental intervention into the practice of medicine and parental responsibilities.

Id. at 14879 (April 15, 1985). The Secretary also stated that the success of implementing the program to monitor and report medical neglect depended on the need to maintain the broad consensus that had sponsored this important legislation: "It was and continues to be of great importance to the Department to preserve and advance this consensus in order to most effectively implement this program." *Id.* at 14879.

Congress deemed it appropriate to utilize the existing state CPS system instead of Section 504 for several reasons. First, all states have a CPS agency, whether they receive state grant funds or not. These child abuse agencies have recognized expertise in the area of child abuse and neglect. *See* 50 Fed. Reg. 14878 (April 15, 1985). Second, many state agencies have already developed relationships with individuals in hospitals to report cases of suspected child abuse and neglect. *See* 49 Fed. Reg. 1631 (Jan. 12, 1984). Third, the framers agreed that procedural requirements should be based on existing state administrative and enforcement mechanisms, rather than creating a new system or bureaucracy of "medical neglect." The Secretary has acknowledged congressional concern over the administrative problems of creating "a new system and a new bureaucracy" to respond to the health care needs of disabled infants. 50 Fed. Reg. 14881.

The Child Abuse Amendments thus represent Congress' determination after extensive debate that the appropriate means to respond to the needs of disabled infants is through the state CPS, not Section 504. Inquiry by this Court into the Secretary's authority under Section 504 is therefore unnecessary.

Petitioner contends that, absent her rules, disabled infants will receive no protection. Pet. at 26. Yet by Petitioner's own admission, the Child Abuse Amendments and regulations promulgated thereunder, ensure the "meaningful protection of the rights of disabled infants to receive appropriate medical care[.]" 50 Fed. Reg. 14881. If anything, disabled infants receive *greater* protection from state CPS agencies since such agencies, unlike HHS's "Baby Doe Squads," have the requisite experience, expertise, professional contacts with hospitals, and enforcement mechanisms to protect the best interests of the child. Petitioner's implementation of a prior, similar rule was disastrous: "Baby Doe Squads" descended on hospitals, disrupting complex medical care and diverting the attention of physicians and nurses caring for the infants. In at least one case, a family withdrew a seriously ill patient from a hospital before completion of treatment because they believed that somehow the hospital that was being investigated was intentionally harming their child.[14] As observed by Judge Gesell, the sudden descent of "Baby Doe Squads" interrupting medical care "can hardly be presumed to produce higher quality care for the infant." *American Academy of Pediatrics v. Heckler*, 561 F. Supp. at 399. The Amendments, on the other hand, guarantee that severely disabled infants will receive appropriate medical care while

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[14] *See, e.g.*, Affidavit of Norman B. Urmy (submitted as an attachment to the Memorandum of Law filed by the National Association of Children's Hospitals and Related Institutions (NACHRI)), and Affidavit of Paul M. Rosenberg (submitted as an attachment to the Amicus Brief filed by the American Hospital Association, Respondent in this case) in American Academy of Pediatrics v. Heckler, 561 F. Supp. 395.

avoiding unwarranted intrusion of the federal government in medical and parental decisionmaking. Thus, contrary to Petitioner's suggestion (Pet. 26-27 n.22), the Amendments effectively dispose of the need to review this case.

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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